UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CATHERINE F. LISTON,	)	
	)	
Plaintiff	)	
	)	
v.	)	**CIVIL NO. 01-CV-80-P-C**
	)	
UNUM CORPORATION OFFICER SEVERANCE PLAN, ROBERT C. CORNETT, AND UNUMPROVIDENT CORPORATION,	)	
	)	
Defendants	)	

RECOMMENDED DECISION

Catherine F. Liston has commenced a civil action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132, alleging that the Unum Corporation Officer Severance Plan, the Plan Administrator, Robert C. Cornett, and the UnumProvident Corporation (collectively, "the defendants"), unlawfully withheld severance benefits (Count I) and information concerning the Plan that the defendants were allegedly required to provide to her (Count II). Now before the court is the defendants' motion to dismiss Count I; their motion for a more definite statement regarding Count II; and UnumProvident's motion to dismiss all claims against it on the ground that it is not a proper party defendant. I recommend that the court **DENY** the motions to dismiss and **GRANT** the motion for a more definite statement on Count II.

BACKGROUND

Catherine Liston is a former officer and employee of UnumProvident. She is a participant in and beneficiary of the Unum Corporation Officer Severance Plan ("the Plan"). (Complaint at ¶ 1.) Unum Corporation, a predecessor corporation to UnumProvident, first adopted the Plan in 1997. (Id. at ¶ 6.) At that time, Liston was an employee of Unum Corporation. On June 30, 1999, as a result of a corporate merger, Liston became an employee of UnumProvident. (Id. at ¶ 9.) As a result of the merger, Liston's pre-merger position of Vice President of Central Operations was eliminated and Liston was transferred to the position of Vice President, Portland Customer Care (Claims). Liston contends that this transfer changed the nature of her employment significantly, adversely altering the nature and status of her duties and responsibilities, including "significant adverse alteration of her away-from-home travel requirements [and] work schedule, and a significant adverse reduction in her decision-making authority, strategic position, and discretion." (Id. at ¶ 13.)

In March 2000, Liston requested a determination that the aforementioned changes in her employment amounted to a "job elimination" qualifying her for severance benefits under a "Change in Control" provision of the Plan. (Id. at ¶ 14.) The Change in Control provision provides:

> **Change in Control**
>
> In the event of a change in control of UNUM Corporation, officers whose jobs are eliminated within 365 days of the change in control will be eligible for severance benefits so long as they meet the eligibility requirements of the Severance Plan section on Eligibility, and providing they are not eligible for severance benefits under any separate agreement with UNUM Corporation or the UNUM Employer regarding change in control. For the purposes of this subsection only, job elimination shall include termination for any of the following reasons:

> The significant adverse reduction or alteration in the nature and status (other than title) of the officer's position, duties or responsibilities immediately prior to or within 365 days of the change in control.
>
> * * * *
>
> The severance payment under this provision will be 52 weeks of salary. Payment will be made as a single sum, minus any applicable withholding or deductions.
>
> * * * *

(UNUM Corporation Officer Severance Plan, September 1997, Complaint Exhibit A.)

Robert K. Hecker, a UnumProvident employee, notified Liston by letter dated April 4, 2000 that the changes in her employment did not amount to a "job elimination" under the change in control provision. (Id. at ¶ 15.) Liston appealed this determination to the "Plan Review Committee." The review committee rejected her appeal in a letter dated June 13, 2000. (Id. at ¶¶ 16-17.) Liston appealed again, this time to the "Plan Benefit Administrative Committee." On June 16, 2000, Unum-Provident terminated Liston's position. (Id. at ¶ 12.) By a letter dated August 3, 2000, and in several subsequent letters, Liston requested that Plan Administrator Cornett and UnumProvident furnish her with certain undisclosed information related to the Plan and her benefits claim. The defendants did not provide all of the information she sought. (Id. at ¶¶ 21-22.) Ultimately, in a letter dated December 1, 2000, the administrative committee, headed by Plan Administrator Cornett, rejected Liston's appeal. (Id. at ¶¶ 18, 20; Defendants' Motion to Dismiss Complaint and Motion for a More Definite Statement, Docket No. 4, at 2 n.1.)

According to Liston's allegations, the denial of her claim stems from a July 6, 1999 administrative rule, adopted by Plan Administrator Cornett in the wake of the merger, that "narrowed the Plan's eligibility requirements and purported to apply the new requirements retroactively." (Id. at ¶ 11.) The rule that she references is provided by the defendants in an addendum to their motion. (Defendant's Motion to Dismiss Complaint and Motion for a More

Definite Statement, Docket No. 4, Appendix A.) The rule sets forth specific, limited circumstances in which an officer will be entitled to severance benefits, that is, to have suffered a "significant adverse reduction or alteration in the nature and status (other than title) of the officer's duties or responsibilities." Evidently, Liston's post-merger circumstance did not meet any of the enumerated tests.

Count I of Liston's complaint, filed March 22, 2001, alleges that the July 6, 1999 administrative rule is "unlawful, unenforceable, and contrary to the plain terms of the Plan," and that Liston is entitled to severance benefits consisting of 52-weeks salary and three months of COBRA benefits. (Id. at ¶¶ 26-27.) Count II alleges that Liston is also entitled to statutory penalties pursuant to 29 U.S.C. § 1132(c)(1), based on the defendants' failure to provide her with the all of the information she requested. (Id. at ¶ 29.) Liston seeks these sums of money, a "declaration" of her rights under the plan, a "declaration" that the administrative rule is unenforceable, and fees, interest, and costs.

DISCUSSION

The defendants have filed a joint motion to dismiss Count I and a motion for a more definite statement regarding Count II. (Docket No. 4.) In addition, UnumProvident moves to be dismissed as a party to this suit. I will address the motion to dismiss Count I first and then consider UnumProvident's motion to be dismissed from the case. Finally, I will address the motion for a more definite statement concerning Count II.

1. Motion to Dismiss Count I

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the claimant's favor, and determine whether the complaint, when viewed in the light most favorable

to the claimant, sets forth sufficient facts to support each element of the challenged claims. Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998). In addition to construing the factual allegations contained in the complaint, the court may consider "the relevant entirety of a document integral to or explicitly relied upon in the complaint . . . without converting the motion [to dismiss] into one for summary judgment." Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996).

The defendants argue (1) that the allegations fail to state a claim because they do not recite that Plan Administrator Cornett's final benefits decision was "arbitrary and capricious"; and (2) that the claim is doomed because the Plan vests the plan administrator with "complete discretionary authority" to construe the language of the Plan and make rules and regulation to administer the Plan and the administrative rule of which Liston complains was a reasonable interpretation of the Plan. Liston responds that she has provided a "short and plain statement" of her claim and that it is unclear whether the "arbitrary and capricious" standard will govern the court's review of the challenged administrative rule and denial of benefits.

Pursuant to 29 U.S.C. § 1132(a)(1)(B) a plan participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan." The Supreme Court has held that a denial of benefits "is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the Plan," in which case an arbitrary and capricious standard is imposed. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 114 (1989). However, even when a plan delegates discretionary authority to the administrator or fiduciary, "the [arbitrary and capricious] standard may not be warranted . . . when a conflict of interest exists, such as when the policy

manager has a personal interest contrary to the beneficiary's." Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998). In other words, the question of the governing standard "often presents the defining issue in ERISA cases." Guarino v. Met. Life Ins. Co., 915 F. Supp. 435 (D. Mass. 1995); see also De Dios Cortes v. Metlife, Inc., 122 F. Supp. 2d 121, 128 (D.P.R. 2001) (addressing applicable standard issue at summary judgment stage).

I am not inclined to think the Court should resolve this issue at this juncture based solely on the complaint and the language of the Plan. Nor do I consider it paramount that a plaintiff recite the applicable standard of review in her complaint in order to state a claim.[1] In general, bare recitation of a governing legal standard provides nothing more than an unhelpful conclusory allegation. In fact, this is precisely the criticism that the defendants level against Liston's allegation that the administrative rule is "unlawful, unenforceable, and contrary to the plain terms of the Plan." (Docket No. 4 at 5, discussing Complaint at ¶ 27.) I particularly do not see why a standard of *review*, which sets parameters on the Court's consideration of the record, findings, and conclusions of a prior proceeding, would be a required element of a substantive claim. In this case, I consider the notice requirement to be met because the complaint sets forth the facts that Liston is a beneficiary of the Plan, that she made a claim for benefits, that the plan administrator denied her claim, and that she is suing to challenge the basis for the denial. This is all that the language of § 1132(a)(1)(B) requires.

[1] The defendants cite Albert Einstein Med. Ctr. v. Nat'l Benefit Fund for Hosp. & Health Care Employees, 740 F. Supp. 343, 352 (E.D. Pa. 1989) (dismissing claim for failure to allege fiduciary acted arbitrarily and capriciously). That case relied on Armbruster v. Benefit Trust Life Ins. Co., 687 F. Supp. 403, 406 (N.D. Ill. 1988), a pre-Bruch case, which has since been overruled, based directly on the Supreme Court's holding in Bruch. See Hemphill v. Unisys Corp., 855 F. Supp. 1225, 1233 (N.D. Ill. 1994) ("Although Hemphill's complaint is no model of clarity, the court finds that it states a § 1132(a)(1)(B) claim because it gives fair notice to Unisys that Hemphill is (1) a participant (2) in an employee benefit plan (3) who is suing to recover benefits under the plan.").

2. Motion to Dismiss claims against UnumProvident

The general rule is that an employer is not a proper party to an ERISA suit brought pursuant to 29 U.S.C. § 1132 unless "it is the designated plan administrator or fiduciary . . . [or] it is the employee benefit plan's sponsor and no other administrator or fiduciary has been designated." Beegan v. Associated Press, 43 F. Supp. 2d 70, 73 (D. Me. 1999). An exception to this rule exists "if the plaintiff shows that the employer controlled or influenced the administration of the plan." Id. (collecting cases); see also Law v. Ernst & Young, 956 F.2d 364, 373 (1st Cir. 1992) (holding that summary judgment in favor of an employer is inappropriate where "the employer may, as a matter of fact, have taken an active part in the administration of the pension plan") (citation omitted).

In this case, Liston has identified defendant Cornett as the plan administrator and the designated fiduciary of the plan. (Complaint at ¶ 3.) Thus, UnumProvident, as the employer, can only be a proper defendant to this suit if the factual allegations and pertinent plan language tend to show that Unum-Provident controlled or influenced the administration of the plan. Beegan, 43 F. Supp. 2d at 74 ("Where an administrator has been appointed by the plan, it is the responsibility of the plaintiff to show that the employer influenced or controlled the administrator's or fiduciary's decision.") Liston's pertinent allegations state in paragraph 4 that UnumProvident "is the de facto administrator of the Plan and a Plan fiduciary . . . and funds the Plan's benefits out of its current assets" and in paragraph 23 that UnumProvident "at all relevant times . . . directed and controlled all actions of . . . Cornett and the Plan committee and agents, and operated the Plan independent[ly] of its terms as a mere extension of [its] non-Plan personnel and employment policies." With the exception of the allegation that UnumProvident pays benefits out of its current assets, these allegations are conclusory statements that cannot

overcome a motion to dismiss. See id. Additionally, Liston points to allegations that Cornett and the first decision-maker on her claim, Hecker, were both UnumProvident employees and that the administrative rule she complains of was adopted shortly after the merger. (Complaint at ¶¶ 4, 8, 10, 11, 15.) I will consider these factual allegations in conjunction with the "relevant entirety" of the Plan, which Liston appended to her complaint.

To begin, the cases relied on by Liston in her responsive memorandum have no bearing on the sort of allegations involved in this case. In Hamilton v. Allen-Bradley Co., 244 F.3d 819 (11th Cir. 2001), a case chiefly relied on by Liston, the Eleventh Circuit permitted a claim to go forward over a summary judgment motion based on the employer's requirement that "employees go through its human resources department in order to obtain an application for disability benefits" and based on the fact that the employer's benefit booklet identified the employer as one of the agents designated to administer the plan. Id. at 824. Similarly, in Hogan v. Metromail, 107 F. Supp. 2d 459 (S.D.N.Y. 2000), the other case chiefly relied on by Liston, the plaintiffs alleged facts indicating that a benefits denial letter they received was written on the employer's letterhead with copies going to the administrator designated in the plan. Id. at 475. These facts permitted the Court to infer that the designated administrator "issued a recommendation and [the employer] made the final decision." Id. Because Liston's complaint is devoid of comparable facts, these two cases do not support her claim against UnumProvident.

The fact that Cornett and his subordinate plan administrators are UnumProvident employees does not, in and of itself, permit an inference of active participation in plan administration.[2] However, the allegations indicate that UnumProvident does not fund the Plan in

[2] See also Reynolds v. Bethlehem Steel Corp., 619 F. Supp. 919, 929-30 (D. Md. 1984) ("This court will not conclude that the fact that the Board members and the Secretary are employees of Bethlehem Steel leads to the conclusion that they acted as agents of Bethlehem Steel, under the influence and control of the employer, when they decided to deny Mr. Reynolds the lump sum payment."). I observe that in McLaughlin v. Reynolds, 886 F. Supp.

a manner that ensures the separation of plan funds from UnumProvident's general control and general assets. Rather, the allegation is that successful claims for benefits are paid directly out of UnumProvident's assets. This allegation permits the inference that the payment of benefits under the Plan directly impacts UnumProvident's profits. This profit motive and the timing of Cornett's interpretation of the change in control provision[3] permit an inference that UnumProvident oversees and influences the administration of the Plan. Finally, on the last page of the section labeled "Additional," the Plan informs participants that if they decide to pursue legal action against the Plan, "[l]egal process may be served on Kevin J. Tierney, General Counsel, at the Employer's legal address." In my view, UnumProvident's use of its general counsel as the process agent for suits involving benefit claims under the Plan also supports the inference that UnumProvident oversees or influences plan administration.

3. Motion for a More Definite Statement on Count II

Pursuant to Rule 12(e), "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Fed. R. Civ. P. 12(e). Liston presses Count II pursuant to 29 U.S.C. § 1132(c)(1), which provides:

> **(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form**

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902 (D. Me. 1995), this Court's decided to allow a claim to proceed against an employer based on allegations revealing a dual agency on the part of the designated plan administrator, in part based on executive positions held by the administrator in subsidiaries of the employer. In addition, the administrator in Reynolds was appointed by an acquiring entity, in the course of a takeover, to interpret terms of a plan designed to protect employees in the event of a takeover. But in that case the court had before it specific facts, including statements made by the administrator indicating that he believed he had to consider the employer's interest when administering the plan. See id. at 906-07. These are the sort of non-conclusory, factual allegations that are absent from the instant complaint.

[3] It may well have been prudence alone that prompted Cornett to interpret the vague change in control provision when he did, but I must indulge Liston with every favorable inference at this juncture in the proceedings.

> **(1)** Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $ 100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

This provision incorporates several distinct disclosure requirements found in other portions of ERISA. The defendants have moved for a more definite statement of this claim because Liston fails to indicate any of the specific disclosure requirements that they are alleged to have violated. Liston's allegations on Count II amount to the following:

> 21. By a letter dated August 3, 2000, and in several subsequent letters, Plaintiff Catherine F. Liston requested that Defendants Robert C. Cornett and UnumProvident Corporation furnish to her information related to the Plan and her benefits claim required by law to be furnished to her.
>
> 22. Defendants Robert C. Cornett and UnumProvident Corporation furnished to Plaintiff Catherine F. Liston a small amount of the information requested and required, and failed and refused to furnish . . . most of [the] information.
>
> * * * *
>
> 29. Plaintiff Catherine F. Liston is entitled to an award of statutory penalties under 29 U.S.C. § 1132(c)(1) for Defendants' failure and refusal to furnish to the Plaintiff the information required by law to be furnished to the Plaintiff.

I am of the opinion that the defendants' motion for a more definite statement is warranted. Although it may not be necessary to state a claim, I agree that Liston should specify the specific disclosure obligations that she contends were violated so that the defendants may respond to specific charges rather than whether or not "most" of the information sought by Liston was either

"required" or "refused."[4] Accordingly, I recommend that the Court **GRANT** the defendants' motion for a more definite statement and give Liston 10 days in which to appropriately amend Count II of her complaint.

CONCLUSION

For the foregoing reasons, I recommend that the defendants' motion to dismiss Count I and for failure to state a claim be **DENIED**; that UnumProvident's motion to be dismissed as a party defendant from the suit be **DENIED**; and that the motion for a more definite statement on Count II be **GRANTED** and that Liston be given ten days to amend her complaint to provide a more definite statement of Count II.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: July 6, 2001

Margaret J. Kravchuk
U.S. Magistrate Judge

[4] Contrary to the defendants' suggestion, Liston need not identify what "document" she was entitled to but did not receive. (Defendants' Reply Memorandum, Docket No. 6, at 4.) Rather, she must identify the basis of the specific disclosure obligations that she contends were violated. It is not necessary at this stage for the court to be provided with all of the parties' correspondence.

MAGREC STNDRD

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-80

LISTON v. UNUM CORP OFFICER SE, et al Filed: 03/22/01

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 791

Lead Docket: None Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 29:1132 E.R.I.S.A.-Employee Benefits

CATHERINE F LISTON LAWRENCE C. WINGER, ESQ.

plaintiff [COR LD NTC]

ATTORNEY AT LAW

75 PEARL STREET, SUITE 217, PORTLAND, ME 04101

207/780-9920

v.

UNUM CORPORATION OFFICER ROBERT S. FRANK, ESQ.

SEVERANCE PLAN [COR LD NTC]

defendant HARVEY & FRANK

TWO CITY CENTER, P.O. BOX 126, PORTLAND, ME 04112

207-775-1300

ROBERT C CORNETT ROBERT S. FRANK, ESQ.

defendant (See above)

[COR LD NTC]

UNUMPROVIDENT CORP ROBERT S. FRANK, ESQ.

defendant (See above)

[COR LD NTC]